# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 29, 2008 |
| v | No. 278793<br>Oakland Circuit Court |
| ROBERT STANTON OAKES,<br><br>Defendant-Appellant. | LC No. 2006-210512-FH |

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and driving with a suspended license, second offense, MCL 257.904(3)(b). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose from a traffic stop in Madison Heights, where police officers who were aware of defendant's previous drug trafficking activities were conducting surveillance on defendant on August 24, 2006. Defendant was observed leaving a motel in his black Lexus, accompanied by a female passenger. The officers knew that defendant's license had been suspended, and decided to perform a traffic stop. An officer drove alongside defendant in an unmarked vehicle while waiting for the arrival of another officer in a marked car to perform the stop. The officer saw defendant lean forward and reach over to the passenger side of the vehicle. After the officer in the marked car stopped defendant, the officers had defendant and his passenger, Crystal Banks, get out of the car. The officers saw Banks throw a plastic bag onto the ground. Inside the bag were 12 rocks of cocaine, weighing approximately 8.5 grams. Two of the rocks were in separate "corner tie" plastic bags. As the officers retrieved the bag, defendant told Banks not to tell them anything, and that she would only get probation because it was her first offense. The officers found marijuana and another plastic bag with corner ties containing two more rocks of cocaine under defendant's seat during a search of the car. Defendant also had $1600 in cash in his pocket. Neither Banks nor defendant appeared intoxicated, or possessed paraphernalia to use the crack cocaine.

Defendant first argues that the trial court erred when it allowed the prosecution to present MRE 404(b) evidence concerning defendant's two prior cocaine deliveries to undercover Madison Heights officers in an unrelated case in April and May of 2006. We disagree.

We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich. 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b) is inclusionary rather than exclusionary. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id*. at 65. Therefore, to be admissible under MRE 404(b), generally bad acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75. The trial court, upon request, should provide a limiting instruction under MRE 105. *Id*.

Defendant argues that the trial court erred because the evidence that he engaged in two prior deliveries of cocaine was not relevant. We disagree. Evidence is considered "relevant" if it makes the existence of any fact at issue more or less probable. *VanderVliet*, *supra* at 60, quoting MRE 401. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *Id.* at 75. Knowledge is an element of possession with intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Delongchamps*, 103 Mich App 151, 191; 302 NW2d 626 (1981). At trial, defendant specifically denied knowing possession of the cocaine. Thus, the evidence of defendant's previous sales was relevant both to refute defendant's assertion and to provide evidence of the element of knowing possession. Similarly, "the fact that defendant had previously completed the act of distribution was relevant to his intent to distribute." *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005).

Defendant cites *Crawford* in support of his claim that evidence of his prior drug sales is irrelevant to the instant case. In *Crawford*, more than 100 grams of cocaine were found in the dashboard of the defendant's car after it was impounded as a result of a 1992 traffic stop, and the defendant was charged with possession with intent to deliver 50 to 225 grams of cocaine. *Id*. at 379-380. The prosecution sought to introduce, and the trial court admitted over the defendant's objection, evidence of the defendant's 1988 delivery of a pound of cocaine to an undercover officer. This earlier delivery occurred in an apartment building. *Id*. at 380 n 1, 381. Our Supreme Court reversed, concluding that the evidence was not probative of the defendant's knowledge and intent with respect to the charged offense because the factual relationship between the 1988 crime and the charged offense was simply too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea in the present case. *Id*. at 396-397. The Court noted, however, that if the previous crime had involved concealment of drugs in the dashboard of the defendant's car, it would likely have been admissible. *Id*. at 395 n 13.

We find that *Crawford* is distinguishable from the instant case. Here, contrary to defendant's assertion, the prior and charged offenses were substantially similar to each other. Both involved retail sales of similar quantities of cocaine, and were consistent with defendant's previous statements to police officers that he sold $30 rocks, and did not use the cocaine himself. In addition, the April 2006 sale of cocaine, like the possession here, involved the transport of cocaine in defendant's car; and cocaine was found in defendant's car in his previous arrest in

May of 2006. Moreover, while the three crimes did not occur immediately after one another, they did occur within a relatively short time span. Thus, unlike the situation in *Crawford*, defendant's prior drug sales were similar enough to the instant crime to be probative of defendant's knowledge and intent, rather than useful only for the prohibited purpose of "only demonstrating that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine." *Crawford*, *supra* at 396-397. See also *McGhee*, *supra* at 611. We conclude that the trial court did not abuse its discretion when it allowed the prosecution to present this prior act evidence.

Defendant next argues that the prosecution presented insufficient evidence to support the possession conviction. We disagree.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. However, we do not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe*, *supra* at 514-515. Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Conviction of possession with intent to deliver less than 50 grams of cocaine requires proof that: (1) the substance recovered is cocaine, (2) the cocaine is an amount less than 50 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe*, *supra* at 516-517. Defendant in this case argues that the last element was not satisfied. However, the evidence presented, if believed by the jury, was sufficient to establish that defendant knew about the cocaine and possessed it, albeit perhaps jointly,[1] with intent to sell it. Some of the cocaine was hidden underneath defendant's seat. At the stop, defendant told Banks not to tell the police anything about the cocaine, which implies that he knew that she had the cocaine in her possession. In addition, one of the arresting officers opined that defendant possessed the drugs with intent to deliver them based on the way the drugs were packaged, the lack of drug paraphernalia, and the money defendant had in his possession. This officer also testified that he saw defendant reaching toward Banks as the two drove. When considered with the 404(b) evidence above, this testimony was sufficient to establish defendant's intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

[1] Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520.

Defendant next argues that his minimum sentence for his possession conviction, which fell within the scored guidelines for this offense, nevertheless constituted cruel and unusual punishment. We disagree.

Defendant was sentenced within the sentencing guidelines range. MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information. This limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). However, a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel and unusual punishment. *Terry*, *supra* at 456.

Defendant has presented nothing to rebut this presumption. He claims that the sentence imposed was not tailored to his circumstances or those of the offense. This contention is without merit. Defendant has a history of drug dealing. Moreover, he committed the instant offense while on work release, only nine days after he had been sentenced for a previous drug offense. Defendant has not shown that his sentence constituted cruel and unusual punishment.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello